

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 27, 1997

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Champion Boxed Beef
Case 27-CA-15278

512-5009-0100
512-5012-9200
512-5072-3900
512-5072-7700

For essentially the reasons set forth in the Region's Request for Advice dated July 1, 1997, the Region is authorized to issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer unlawfully evicted the strikers by seeking and obtaining an overly-broad injunction prohibiting all picketing on its property on the east side of York Street.

Initially, we conclude that the Union's picket-line misconduct was not so egregious as to render the picketing unprotected in its entirety. Peaceful primary picketing in support of a strike is a core Section 7 right. In most access cases after Jean Country, the Board has noted that the union conducted its activity in a peaceful, nondisruptive manner.¹ However, even when misconduct is involved, picketers rarely completely lose their right to picket.² We agree with the Region's determination that the

¹ See, e.g., Mountain Country Food Store, 292 NLRB 967, 968 (1989). Cf. Tecumseh Foodland, 294 NLRB 486 (1989), discussed infra.

² See, e.g., Tecumseh Foodland, 294 NLRB at 487-88, discussed infra, and Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138 (1957) (peaceful picketing erroneously enjoined where no "pattern of violence" established which would inevitably reappear in later picketing). However, the Supreme Court has held that a state can enjoin peaceful acts of picketing when they are "enmeshed with contemporaneously violent conduct" and where the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. Milk

picketing here was generally peaceful, with mass picketing only on the morning of May 12 and isolated blockings of ingress and egress, threats of violence, spreading of nails and damage to a windshield.³ This Union's picketing was not enmeshed with violence so that its right to picket peacefully was forfeited under Meadowmoor and state court decisions which have considered the degree of misconduct required before the right to peacefully picket is forfeited.⁴

Since the employees did not lose their right to picket altogether, we further agree with the Region that they may picket on the Employer's private property. Under A-1 Schmidlin,⁵ striking employees' right to picket on private property is governed by the Board's construction of Babcock & Wilcox in Jean Country,⁶ rather than the more restrictive

Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 291-295 (1940).

³ In a related charge filed by the Employer in Case 27-CB-3710, the Region has concluded that this picket line misconduct is violative of Section 8(b)(1)(A).

⁴ See, e.g., Wilkes Sportswear v. ILGWU, 110 A.2d 418, 35 LRRM 2298 (Pa. 1955) (court properly enjoined non-peaceful picketing including blocking of ingress and egress and physical assault, but should not have enjoined peaceful picketing, as the violence had been "more or less episodic rather than continuous"); State ex rel. Retail Store Employees v. Black, 603 S.W.2d 676 (Mo. Ct. App. 1980) (court acted excessively by enjoining not only obstruction of access but also picketing of any sort on employer's property). But see Altemose Constr. Co. v. Trades Council, 296 A.2d 504 (Pa. 1972) (injunction not overly-broad in prohibiting all picketing where there was a "pattern of violence coupled with intimidation, harassment, and fear which would inevitably turn even peaceful picketing to violence").

⁵ 312 NLRB 201 (1993).

⁶ 291 NLRB 11 (1988).

construction in Lechmere.⁷ Therefore, the Jean Country test should be used to determine whether the Employer legally excluded the employees from the east side of its property.

Here the property right to be balanced under the Jean Country test is strong, as the Employer is the sole owner and occupant of its facility.⁸ The employees are engaged in an economic strike against this Employer and are publicizing their dispute by picketing. The Board considers such picketing a core Section 7 right.⁹ Although this right is arguably diminished by the instances of misconduct,¹⁰ this Section 7 right clearly remains worthy of protection. There are no reasonable alternatives to picketing on the Employer's property.¹¹ Under the Court's restraining order, pickets are allowed only on the far side of a 24-foot street from where they have no ability to confront the employees, customers and suppliers of the

⁷ 502 U.S. 527 (1992). A-1 Schmidlin held that the Lechmere refinement of Babcock does not apply to employees. 312 NLRB at 201 n.3.

⁸ The Region has determined that the public right-of-way begins on the east edge of York Street and runs westward, and that therefore all property on the east side of the street is the Employer's private property.

⁹ See, e.g., Little & Co., 296 NLRB 691, 692-93 (1989).

¹⁰ In Jean Country, the Board listed one of the factors to be considered in assessing the strength of a Section 7 right as "the manner in which the activity related to that right is carried out." Jean Country, 291 NLRB at 13. Thus, even though the nature of the Union's conduct is not so egregious as to render the conduct unprotected, the misconduct must still be considered in balancing the Employer's and the Union's competing interests.

¹¹ There is no contention that picketing on public property at the ends of York Street would be a reasonable alternative means of communication for the Union. [FOIA Exemptions 2 and 5

Employer as they enter the Employer's facility.¹² Giving substantial consideration to the lack of a reasonable alternative means of communication in the present case, as is required under Jean Country, we believe the balance between the Employer's property right and the Union's Section 7 right should be struck in favor of the Union.

Thus, the Union and the strikers are entitled to peacefully picket on the east side of York Street in some manner consistent with the Court's legitimate interest in eliminating the misconduct on the picket line and its power to limit the number of pickets, if necessary. The overly-broad injunction sought and obtained by the Employer, prohibiting all picketing on the east side of York Street, effectively denied the employees their Section 7 right to engage in lawful picketing at the Employer's facilities. Accordingly, the Employer's maintenance of its lawsuit is preempted by the Act and violative of Section 8(a)(1) to the extent that it precludes employees from exercising their Section 7 right to picket peacefully on the Employer's property.¹³

¹² See Thriftway Supermarket, 294 NLRB 173, 174 (employer's designated area in parking lot for picketing was ineffective alternative because very few people came near the area); Little & Co., 296 NLRB at 693, n.8. (no reasonable alternative where many entrances to building and no indication that any single entrance was used by most of the targeted employer's employees and customers). Cf. 40-41 Realty Associates, 288 NLRB 200, 205, n. 18 (1988) (reasonable alternative means to the second-floor interior corridor of a 20-story office building, namely at building's exterior entrances, still allowed pickets to confront target audience, even though they could not be distinguished from the rest of the public entering the building).

¹³ See, e.g., Loehmann's Plaza, 305 NLRB 663 (1991). As set forth in Memorandum OM 97-50, dated July 30, 1997, "Loehmann's letters" should be addressed only to Respondent Employer, with courtesy copies mailed to the Charging Party/Defendants.

We note that the Board's holding in Tecumseh Foodland¹⁴ does not even suggest a contrary result. In that case, the Board found that the manner in which the union engaged in picketing -- five people gathered in front of the small entrance to the employer's store where they tended to obstruct access -- impermissibly impaired the employer's property rights.¹⁵ The Board found that although a proper balancing of the parties' rights would permit the union to distribute its handbills "in some manner and at some place" on the employer's property, the employer "was not required to surrender access to its property without limitation to nonemployees whose numbers and location would tend to impede the access of patrons to its store."¹⁶ Although the Board concluded that the employer did not violate Section 8(a)(1) by ordering the picketers to leave the area when they were blocking ingress and egress, it never intimated that the Employer could ban all future picketing or that the employees by their conduct forfeited all right to picket.¹⁷

Therefore, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer unlawfully sought and obtained an overly-broad injunction prohibiting all picketing on its property on the east side of York Street.¹⁸

B.J.K.

¹⁴ 294 NLRB 486 (1989).

¹⁵ Id. at 488.

¹⁶ Id.

¹⁷ In fact, the Board noted that there was an alternative available to the union, i.e., it could have placed one or two pickets near the store's doors or distributed handbills at some other location on the property. Id. at 488, n. 7.

¹⁸ [FOIA Exemptions 2 and 5

